Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

TA CHEN STAINLESS STEEL PIPE, LTD.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

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148 pp

QUESTION PRESENTED

Whether courts may expand the authority of the Department of Commerce to impose antidumping duties on imports beyond situations permitted by the statute in which Congress narrowed such authority to comply with the international agreements of the United States.

PARTIES TO THE PROCEEDING

Petitioner

Ta Chen Stainless Steel Pipe, Ltd. ("Ta Chen")

Respondent

United States

CORPORATE DISCLOSURE STATEMENT

Per Rule 29.6 of the Rules of this Court, petitioner Ta Chen Stainless Steel Pipe, Ltd. states the following:

Ta Chen Stainless Steel Pipe, Ltd. has no parent company. Ta Chen Stainless Steel Pipe, Ltd. is not publicly held, and there is no publicly held company that owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals -- in the Appendix ("App.") hereto at pages 1a-37a -- is reported at 298 F.3d 1330. The opinions of the U.S. Court of International Trade -- *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, No. 97-08-01344, 1999 Ct. Int'l Trade LEXIS 110 (Oct. 28, 1999) ("*Ta Chen I*") (App. 76a-115a) and *Ta Chen Stainless Steel Pipe, Inc. v. United States*, No. 97-08-01344, 2000 Ct. Int'l Trade LEXIS 107 (Aug. 25, 1999) ("*Ta Chen II*") (App. 38a - 56a) -- are unreported. The February 25, 2000 remand determination of the Department of Commerce (App. 57a-75a) -- i.e., *Certain Welded Steel Pipe from Taiwan, Final Results of Redetermination Pursuant to Court Remand* ("*DOC Remand Results*") -- is not published.

JURISDICTION

The judgment of the Federal Circuit was entered on August 1, 2002, and a timely petition for rehearing was denied on October 10, 2002. App.116a-117a. By letter dated January 8, 2003, the Chief Justice granted petitioner until January 18, 2003 (a Saturday) to file this petition. Since Monday January 20, 2003 is a national holiday and this Court is closed, this petition must be filed by Tuesday January 21, 2003 under this Court's rules. Jurisdiction in this Court is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND LEGISLATIVE HISTORY INVOLVED

The antidumping statute 19 U.S.C. § 1677e(b) states, in pertinent part:

> Adverse inferences. If the administering authority finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information . . . the authority, in reaching a decision, . . . may use an inference that is adverse to the interests of the party in selecting from among the facts otherwise available.

The antidumping statute 19 U.S.C. § 3512(d) also states, in pertinent part, that the Statement of Administrative Action ("*SAA*") is:

> an authoritative expression by the United States concerning the interpretation and application of the [WTO] Uruguay Round Agreements and this Act [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application.

The *SAA* states (H.R. Rep. No. 103-826(I), at 815 (1994)) that:

> repeating the basic provisions [of the U.S. antidumping statute, under the WTO Anti-Dumping Agreement,] national authorities must collect duties, if imposed, in appropriate amounts …not exceeding the dumping margin.

STATEMENT

This case involves an investigation under the U.S. antidumping statute. The statute authorizes the imposition of antidumping duties on imported merchandise that is sold in the United States at prices that are deemed at "less than fair value" (the dumping margin), if such imports cause or threaten to cause material injury to a domestic industry producing merchandise like that imported. 19 U.S.C. § 1673 (1999). The U.S. Department of Commerce ("DOC" or "Commerce" or "the Department") administers the statute. DOC is responsible for collecting data to enable the imposition of antidumping duties in appropriate cases.

The antidumping law provides DOC with certain authority to facilitate its ability to obtain that data. In particular, it allows DOC to draw an adverse evidentiary inference against a party that fails to cooperate adequately in providing requested data. The scope of that authority, however, is narrowly defined by statute. DOC may apply an adverse inference only if it finds that a party "failed to cooperate by not acting to the best of its ability to comply with a request for information" from DOC. 19 U.S.C. § 1677e(b). These statutory provisions, the international agreements that led to their adoption by Congress, and the Federal Circuit's failure to respect their limits, are the focus of this petition.

I. Chronology Of Key Events

Petitioner Ta Chen Stainless Steel Pipe, Ltd. ("Ta Chen"), with its U.S. subsidiary Ta Chen International, sells stainless steel pipe made in Taiwan in the U.S. market. Ta Chen had a U.S. customer named Sun Stainless, Inc., to

whom it last sold pipe in August 1994. App. 2a. At one time, a former minority shareholder of Ta Chen owned Sun, but he sold the company to new owners in July 1995. *Id.* at 2a-3a, 26a.

In 1992, certain U.S. pipe producers filed a petition with DOC alleging that Taiwan producers were selling pipe into the U.S. at prices that were at "less than fair value." After investigation by the DOC and a determination by the U.S. International Trade Commission ("ITC") that the imports caused the requisite injury to domestic producers, an antidumping order was issued applicable to the pipe sold by Ta Chen. App. 3a.

The antidumping order was subject to periodic administrative reviews by DOC pursuant to the antidumping statute. *Id.* In January 1994, DOC commenced an administrative review on imports during the 1992-93 period. Subsequently, DOC commenced two more reviews; the third review, which is the basis for this case and covers imports during the period of December 1994 to November 1995, began February 1996. *Id.*

During the first review (July 1994), U.S. producers alleged to DOC that Ta Chen was "affiliated" with Sun. If true, Sun's sales were potentially relevant to the investigation to determine the dumping margin. App. 21a. In fact, however, DOC could not have found that Sun was "affiliated" with Ta Chen at that time, given then agency practice that the law required current ownership of at least 5% of one party in another to find them to be related parties. App. 4a, 22a-23a. Thus, at the time of the U.S. producers' allegation, or indeed for several years thereafter, DOC did

not question Ta Chen as to its relationship with Sun, nor did DOC request Sun's resale data. *Id.*

In 1995, Congress amended the antidumping statute to broaden the definition of "affiliate" to include situations where one company has the potential to control another. App. 4a, 24a. In October 1996, for the first time, DOC requested that Ta Chen provide information on its relationship with Sun (but not Sun's resales of Ta Chen's product). *Id.*

In November 1999, DOC first specifically requested that Ta Chen provide data on Sun's resales as to Ta Chen's August 1994 sales to Sun. App. 5a, 19a, 24a-28a, 33a-34a, 58a-59a, 66a. The request was made over five years after Ta Chen had stopped selling pipe to Sun (in August 1994) and over four years after Ta Chen's former shareholder sold his ownership stake in Sun (in July 1995). Although Ta Chen and its counsel made repeated efforts to contact Sun's new owners and elicit their cooperation to obtain the information requested by DOC, the new owners of Sun refused to provide it, explaining that Sun no longer had operations in the U.S. and assembling the requested data would be unduly burdensome. App. 5a-6a, 28a-29a, 59a. Neither DOC nor the courts below have suggested anything more Ta Chen could have done to obtain the requested information. App. 6a, 10a-12a, 59a.

II. Course Of Proceedings Below

A. In its administrative review of 1994-95 imports, DOC imposed an adverse inference dumping margin on Ta Chen's sales to Sun, stating that Ta Chen did not act "to the best of its ability" to supply Sun's sales data in response to

DOC's November 1999 request. App. 58a-61a. DOC explained that Ta Chen should have "taken steps to obtain and preserve the relevant records" before DOC requested them because "Ta Chen had notice that its relationship with Sun in particular raised a question *with the Department* as to affiliation at least as early as *October 1996*", based on a DOC questionnaire issued to Ta Chen at that time asking about Ta Chen's relationship to Sun (though not requesting Sun's resale data). App. 29a & 66a (emphasis added). As noted above, October 1996 was long after any conceivable connection between Ta Chen and Sun ended.

Using the "adverse inferences" provision of the statute 19 U.S.C. § 1677e(b), DOC selected the single highest dumping margin found on Ta Chen's sales to customers other than Sun to calculate the dumping margin for sales to Sun. App. 6a, 62a. DOC said that it selected that margin to deter non-compliance with its request for information -- i.e., irrespective of whether the selected margin was aberrant or otherwise not representative of Ta Chen's selling practices, including as to the sales to which the selected margin was applied. App. 74a. In the alternative, DOC held that the selected margin was representative of Ta Chen's sales, based on an analysis where *non-price* factors were determinative, finding the actual prices unimportant to its analysis. App. 73a.

B. Ta Chen appealed the DOC decision to the U.S. Court of International Trade ("CIT"). The CIT affirmed. App. 38a-56a. The CIT said that "Ta Chen should have preserved Sun's information" because, "as early as *July 1994*, Ta Chen knew its relationship with Sun was at issue" because *U.S. producers* had called it to DOC's attention in the first review. App. 45a.

The CIT also rejected Ta Chen's objections that the selected adverse inference dumping margin applied to Ta Chen's sales to Sun was invalid because it was based on a single sale that did not correspond to the reality of Ta Chen's selling practices regarding the Sun sales. At the same time, the CIT rejected DOC's finding that the sale used to calculate the adverse inference dumping margin was representative on the basis of an analysis of *non-price* data; but instead affirmed DOC's decision on an analysis making *price* factors determinative, an analysis DOC had rejected. App. 53a.

C. Ta Chen appealed the CIT decision to the Federal Circuit. The Federal Circuit affirmed. App. 1a -37a. The court made no effort to justify its decision under the terms of 19 U.S.C. § 1677e(b). To the contrary, the court acknowledged that "it is true that a respondent to a Commerce inquiry only has an obligation to produce data requested by Commerce, see 19 U.S.C. § 1677e(b)." App 10a. At no point did the Federal Circuit suggest that Ta Chen had access to the Sun resale information after it was requested by Commerce. *Id.* But the court concluded that "it is reasonable in this case for Commerce to expect Ta Chen to preserve its records in the event that Commerce itself would request them" because the *U.S. producers* had raised Ta Chen's relationship with Sun in *1994* (at a time when the law clearly provided that Sun was not an affiliate of Ta Chen such that its resale data would be relevant). App. 4a, 10a-11a.

The court also affirmed the amount of the adverse inference dumping margin applied to Ta Chen's sales to Sun, explaining that "Commerce acts within its discretion so long

as the rate chosen has a relationship to the actual sales information available" -- i.e., the single sale with highest dumping margin to a customer other than Sun -- even if Commerce chooses unrepresentative sales "with an eye toward deterrence." App. 16a-17a. The Federal Circuit did not even consider -- i.e., viewing it as legally irrelevant -- if the record evidence as a whole indicated that DOC's selected adverse inference margin was aberrant and not representative as to the sales to which it was applied, as argued by Ta Chen.

Judge Gajarsa dissented, remarking that the "majority concludes that Commerce may penalize importers for failing to engage in divination." App. 20a The dissent emphasized that "the pertinent statutes authorize Commerce to impose an adverse inference only after an importer fails to comply to the best of his ability with a request for information" from Commerce, and clearly does not "authorize Commerce to impose an adverse inference on the grounds that an importer failed to predict a future request and take affirmative steps to obtain information before Commerce requested it." App. 19a. Noting that Ta Chen's relationship with Sun was long over before Commerce gave any indication that an affiliation with Sun existed under the new law, the dissenting judge disagreed with the majority that "it is reasonable for Commerce to expect Ta Chen to obtain and preserve Sun's records." App. 29a. "More importantly," he continued, "even were such an expectation reasonable, there is simply no statutory authority allowing Commerce to assume adverse facts against an importer for failing to predict what information Commerce might someday request." App. 34a.

Judge Gajarsa concluded by stating that the Federal Circuit majority's opinion had broad and damaging ramifications, giving "Commerce carte blanche to require

importers to gaze into their crystal balls, and to affirmatively obtain records that Commerce may never request, or may request years later under a subsequent change in the law. Imposing this requirement is both unreasonable and, more importantly, contrary to law." App. 37a.

REASONS TO GRANT THIS PETITION

Review is needed in this case because this Federal Circuit decision (a) expands agency powers well beyond those permitted by a key U.S. trade statute that Congress adopted to bring this country into compliance with its international obligations, and (b) increases greatly the burdens and risks on the trade community in conducting its affairs. Contrary to that statute and U.S. international obligations for which the statute was adopted to satisfy, the Federal Circuit condones antidumping duties (a) based on adverse inferences that are impermissibly imposed against parties who acted to the best of their ability to cooperate with a request for information from the administering authority and (b) that are imposed purely for punitive or deterrence purposes irrespective of the actual margin of dumping as to the sales to which the adverse inference is applied.

The antidumping law has a major impact on this nation's foreign commerce and its international relations. Because the Federal Circuit has exclusive jurisdiction to review cases under this law, circuit conflicts that would normally bring the law before this Court do not arise. More than twenty years have elapsed since this Court last considered an international trade case. During that period, the Federal Circuit has issued 116 decisions in such cases. As this Court has recognized in other areas of the law, such as patents and tax, it is appropriate for this Court to intervene

on occasion to review anomalous Federal Circuit decisions even though a conflict between the circuits will not exist due to the Federal Circuit's exclusive jurisdiction. *See, e.g., Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17 (1997); *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989).

I. The Federal Circuit Decision Gave The Department Of Commerce Authority That Congress Had Taken Away By Statute In Order To Bring This Country Into Compliance With Its International Obligations.

Two centuries ago, this Court held in *Alexander Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804), that, where possible, a statute must be construed to conform to the international obligations assumed by this country.[1] The Federal Circuit's decision negates revisions to the U.S. antidumping statute that Congress adopted to bring the United States into compliance with its international agreements.

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[1] *See also* Restatement (Third), Foreign Relations Law of the United States § 111 (1987) ("[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States").

A. The Federal Circuit Decision Contravenes Revisions Congress Made To The Anti-Dumping Statute Per International Agreement That Adverse Inferences Are Only Permitted Against Those Who Did Not Act To The Best Of Their Ability To Comply With A Request For Information.

Under the 1995 amendments to the antidumping statute, incorporated in the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994), Congress stated that DOC may use adverse inferences only if a party fails to "cooperate by not acting to the best of its ability to comply with a request for information" from DOC. 19 U.S.C. § 1677e(b) (2000). Congress purposely changed the prior law -- i.e., 19 U.S.C. 1677e(c) (1979) -- that had allowed the agency to use adverse inferences (then called best information available) "whenever a party or any other person ... is unable to produce information..."

The *SAA* accompanying the URAA was prepared by the U.S. Trade Representative and other agencies of the Executive Branch involved in the actual negotiations of the international WTO Anti-Dumping Agreement as to permissible use of antidumping laws of WTO member countries.[2] The *SAA,* ratified by Congress in the URAA,[3]

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[2] H.R. Rep. No. 103-826(I), at 656, 868 & 870 (1994); *SAA*, *reprinted in* 1994 U.S.C.C.A.N. 4040.

[3] The *SAA* is "an authoritative expression by the United States concerning the interpretation and application of the [WTO] Uruguay Round Agreements and this Act [the URAA] in any

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sheds important and guiding light on the intentions of the negotiators of the WTO Anti-Dumping Agreement on this matter. The *SAA* states (at 868-70) that:

> In conformity with the WTO Antidumping Agreement, ... section 776(b) [of the new U.S. law] permits Commerce ... to draw an adverse inference where a party has not cooperated in a proceeding. A party is uncooperative if it has not acted to the best of its ability to comply with requests for necessary information [from the administering authority. The URAA] amends [the current U.S. statute] to implement these provisions in the Agreement.

One WTO dispute panel has already found that an administering authority's practice to apply adverse inferences beyond situations specifically authorized by the WTO Anti-Dumping Agreement -- i.e., in cases where a party fails to act to the best of its ability in response to a request for information from the administering authority -- a violation of the Agreement.[4] A WTO Appellate Body affirmed that the U.S. acted impermissibly when it applied adverse inferences against a party for failure to provide

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judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

[4] *WTO Dispute Panel Report on Argentina-Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WTO Panel Report, WT/DS 189/R, November 5, 2001 ¶ 6.55, published in *Bernan's Annotated Rep.*, Volume 35, at 11 (2002).

information not in that party's possession, but rather in the possession of an uncooperative affiliate reseller.[5] The violation of international obligations of this country is even more severe here where the reseller was not even an affiliate under the law at the time of the sales in issue or at the time of the DOC request.

The Federal Circuit in this case disregarded Congress' revision of the antidumping statute to bring this country into compliance with its international obligations. The Federal Circuit determined that it was "reasonable" to use adverse inferences against a party who cooperated to the best of its ability at the time of the DOC request, but failed to anticipate that DOC might request the information years after the sales in issue when the information was not available. App. 10a. The Federal Circuit found no fault in Ta Chen's efforts to comply with DOC's request when it was made. Still, the Federal Circuit condoned the use of adverse inferences though not permitted by the statute Congress enacted to comply with this country's WTO obligations.

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[5] *WTO Dispute Panel Report on United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WTO Appellate Body Report, WT/DS 184/AB/R, August 23, 2001, ¶¶ 97-110, as published in *Bernan's Annotated Rep.*, Volume 32, at 273 (2001).

B. The Federal Circuit Decision Impermissibly Condoned The Agency Position That Adverse Inference Dumping Margins May Be Imposed Purely For Punitive Or Deterrence Purposes, Even If They Bear No Relation To The Margin Of Dumping Of The Sales To Which They Are Applied.

The court of appeals' held that DOC may use any sale to determine the adverse facts available dumping margin, irrespective of whether that sale is probative of the dumping margin as to the sales to which it is applied – i.e., ignoring all other record evidence in this case. That holding violates the antidumping statute Congress adopted to bring the United States into compliance with its WTO obligations.

The URAA, effective January 1, 1995, codified the remedial nature of the antidumping statute in 19 U.S.C. § 1673d(b)(4)(A) (noting "the remedial effect of the antidumping duty order"). In particular, the antidumping statute requires DOC to impose antidumping duties on imported merchandise that is being sold in the United States at below fair value (the dumping margin), if the ITC has found those imports injure, or threaten to injure, a domestic (U.S.) industry. 19 U.S.C. § 1673 (1999). The antidumping duty that is imposed is the amount by which the price charged for the subject goods (after various adjustments) in the home market exceeds the price (after other adjustments) charged to unrelated customers for like goods in the United States (again, the dumping margin). 19 U.S.C. § 1673 &

1673e(a).[6] In other words, the statute is plainly remedial in purpose.

In adopting the amendments to U.S. law to conform to the WTO Agreements, Congress emphasized its statutory purpose to avoid situations where "use of [certain] sales would lead to irrational or unrepresentative results" in determining the actual amount of dumping. URAA, 103rd Cong., 2d Sess, Rept. 103-826, Part 1, Oct. 3, 1994 at 77. Congress specifically stated its purpose "to conform U.S. law more specifically to the provisions of the [WTO] Agreement." *Id.* The *SAA* states (at 815) that, "repeating the basic provisions" of the U.S. antidumping statute, under the WTO Anti-Dumping Agreement, "national authorities must collect duties, if imposed, in appropriate amounts ... not exceeding the dumping margin." Article 9.3 of the WTO Anti-Dumping Agreement states that the "amount of the antidumping duty shall not exceed the margin of dumping."

Commerce candidly acknowledges in this case that it disregards these statutory and WTO mandates, noting that it:

> Never determined that an adverse facts available margin should be reflective of a respondent's actual dumping margins. The purpose of applying adverse facts available is to induce respondents to cooperate with the Department's proceedings.

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[6] Section 1677b(a) of 19 U.S.C. also confirms that the antidumping statute is remedial, and not punitive (providing that "a fair comparison shall be made between the export price or constructed export price and normal value.")

App. 74a. The Federal Circuit upheld DOC's action on the ground that the agency used data for a single sale to determine the adverse inference dumping margin and thus no further inquiry was necessary. App. 16a-17a.

But the standard explicitly set forth by the WTO Agreement that Congress ratified in the URAA requires the determination of dumping margins based on all available record facts, not simply the selection of the dumping margin on a single sale without consideration of the record as a whole. The antidumping statute mandates that, in situations in which adverse inferences may be necessary, DOC "must make [its] determinations based on *all* the evidence of record, weighing the record evidence to determine that which is most probative of the issue under consideration" – i.e., the amount of dumping. *SAA* at 869 (emphasis added); S. Rep. No. 103-412, 2d Sess. at 87 (1994). This mandate also reflects the statutory requirement that DOC's antidumping decisions be supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(l). This Court holds that agency actions must be supported by substantial evidence, "when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view." *Universal Camera Corp. v. NLRB*, 340 U.S. 477, 488 (1951). The Federal Circuit's decision flouts the substantial evidence rule that envisions weighing the evidence of record as a whole, and is thus contrary to the statute and this Court's decisions.[7]

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[7] It is true that use of adverse facts available is an investigative tool designed to induce providing information and that a party should not get a more favorable result by not cooperating. *SAA* at 868; WTO Anti-Dumping Agreement, Annex II, ¶7. But those

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Congress, pursuant to U.S. international obligations, revised the antidumping statute to not allow the imposition of antidumping duties for penalty purposes. The Federal Circuit rule of law in this case allows DOC to impose antidumping duties for penalty purposes, contrary to both Congressional intent and U.S. international obligations.

II. The Issues Raised In This Petition Are Of Considerable Importance.

This seminal Federal Circuit decision has widespread ramifications.

First, a series of multilateral trade agreements, beginning with the General Agreement of Tariffs and Trade ("GATT") and now the WTO system have reduced tariff and non-tariff trade barriers, liberalized trade, and increased world prosperity and peace. Abuse of antidumping laws – i.e., to appease domestic protectionist interests and re-impose tariffs -- can be and is viewed by professional observers of the subject as a major threat worldwide to the important progress made in the last fifty years following the adoption of the GATT.[8]

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statutory and WTO principles do not mean that the statutory and WTO mandate to accurately calculate the dumping margin may be overridden for purely punitive anti-dumping duties.

[8] *See* David Palmeter, *The Antidumping Law: A Legal and Administrative Nontariff Barrier, in Down in the Dumps: Administration of the Unfair Trade Laws* 64, 69-70 (Richard Boltick & Robert Litan, eds. 1991). The international WTO

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In this regard, it is important to consider the interests of U.S. exporters who are subject to foreign antidumping measures. U.S. actions serve as a model for other countries in their own application of antidumping laws under the WTO Anti-Dumping Agreement. For this reason, the U.S. government itself emphasizes the importance of adhering to international trade rules:

> A rules-based system under the WTO governing international trade is in the national interest of the United States ... The system has worked to the benefit of the United States, providing a means to enforce U.S. rights and contributing to greater compliance by WTO Members ... A major concern [is] that U.S. exporters are treated fairly in anti-dumping cases. U.S. exporters are a frequent target of foreign antidumping proceedings, with over 100 investigations initiated against them since 1995.[9]

In the same vein, Congress stated in the recently enacted Section 2102 of the Trade Act of 2002, P.L. 107-147 sec. 2105(b)(3), 116 Stat. 933, 1016, that the overall trade objective of the United States is "to further strengthen the

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Uruguay Round fight to curb antidumping law excesses is described in I. M. Destler, *American Trade Politics* 240-44 (Inst for Int'l Econ. 3d ed. 1995).

9 Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body, Report to Congress Transmitted by the U.S. Secretary of Commerce at 1 & 15, Dec. 30, 2002.

system of international trading disciplines and procedures," including such trade remedies as antidumping measures. The *SAA* (at 807) emphasizes that the substantive and procedural rules of the WTO Anti-Dumping Agreement:

> ensures U.S. exporters fair treatment in foreign antidumping investigations [and that] *all* countries which become members of the [WTO] will be subject to the same antidumping rules [and to preclude] rewriting the terms of the Anti-Dumping Agreement under the guise of legal interpretation ... Article 1 sets forth the general principle that antidumping measures must be applied only under the circumstances provided for in Article VI of GATT 1994... (emphasis in original)

The Federal Circuit decision contravenes the U.S. antidumping statute that Congress adopted to comply with this country's international obligations under the WTO Anti-Dumping Agreement. The Federal Circuit decision thereby undermines both Congressional and Executive Branch efforts in the WTO to tighten disciplines on antidumping measures via firm adherence to a rule of law.

Second, never, until now, have the burdens and obligations created by this Federal Circuit decision been imposed on the trade community in the conduct of its business: A party has never before been subjected to adverse inferences for failure to anticipate that the law might change. No other party has been required to anticipate DOC's future views and thus collect and preserve information from another party just in case DOC wishes to expand its investigative horizons. Moreover, the mere allegations of a private party (as opposed to a request from the agency

administering the antidumping law) have never before been held to create obligations on parties in antidumping cases as to data collection and preservation, including from customers. Without statutory authority, the Federal Circuit has effectively deputized private parties as "attorneys general" in antidumping cases.

The burdens and risks generally created by the Federal Circuit's decision are well illustrated in this case. Ta Chen is being subjected to 30.9% antidumping import duties on sales in August 1994 because it failed to anticipate then that years later DOC antidumping law would change and DOC would request data in the files of one of Ta Chen's customers. Ta Chen is being punished for not taking steps to obtain and preserve the customer's data regarding costs and resales of product acquired from Ta Chen, which would ordinarily be regarded as confidential and would not lightly be given to the supplier.

Despite requests from the trade community, DOC has steadfastly refused to define when it will apply the new broad statutory definition of "affiliate" to hold, as it did here, that it needs customer resale data on the grounds that the supplier has a potential to control or affect the customers' resales. DOC, *Notice of Proposed Rulemaking*, 61 Fed. Reg. 7308, 7310 (1996) ("the Department appreciates the [trade community's] desire for greater guidance concerning the definition of 'control.' However, the Department does not believe that it is now in a position to" offer such guidance); DOC, *Anti-Dumping/Countervailing Duties (Final Rule)*, 62 Fed. Reg. 27296, 27297 (1997) (affirming the proposed regulations on this issue). DOC has said that it will tell parties its views in particular cases only after the fact. *Id.*

Under the Federal Circuit's decision, all of the subjects of an antidumping investigation may be exposed to adverse inferences for their possible failure to have looked into crystal balls and obtained customer resale data at some point in the past. In direct contravention of Congress's mandate, a party is now unable to protect itself against adverse inferences even if the party follows the statutory directive to act "to the best of its ability to comply with a request for information" from DOC, as required by 19 U.S.C. § 1677e(b).

CONCLUSION

This petition for a writ of certiorari should be granted to allow this Court to review a major Federal Circuit decision affecting an area of that court's unique and exclusive jurisdiction that has never been examined by this Court since the Federal Circuit was created.

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